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Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR
(C.G.)

Cr. Appeal. No. 63 Of 2006

(Memorandum of Cr. Appeal u/s 374 (2) of Cr.P.C.)

APPELLANT: (In Jail)

Natwar Dewangan, S/o NARHAR ~~Nahar~~ Dewangan, aged about 22 Years, residence of village – Keregaon, P.S.- Arjuni, Distt.- Dhamtari (C.G.)

-VERSUS-

RESPONDENT:

State of Chhattisgarh, through the District Magistrate, Dhamtari (CG).

MEMORANDUM OF CRIMINAL APPEAL UNDER SECTION 374 (2) OF Cr.P.C.

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HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

Before : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Criminal Appeal No. 63 of 2006.

Appellant : Natwar Dewangan

- Vs.-

Respondent : State of Chhattisgarh

Present: Shri P.C. Pant and Shri Nitesh Pant, learned counsel for the appellant.
Shri Ashish Shukla, learned Govt. Advocate, for the State.

JUDGMENT
(Delivered on 10th March, 2006)

This appeal is directed against the Judgment dated 10-01-2006, delivered by Shri R.P. Sharma, learned Additional Sessions Judge, Dhamtari, in Session Case No.140 of 2005, whereby the appellant was convicted under Section 376 (1) of the Indian Penal Code and was sentenced to undergo R.I. for 7 years and to pay a fine of Rs.100/-, and in default of payment of fine to undergo additional imprisonment for one month.

(2) Briefly stated prosecution story is that on 23-10-2004, the prosecutrix, a married lady went behind the Badi of her house at about 9.30 p.m. for attending call of nature. The appellant came there, pushed her on the ground, lifted her clothes and mounting upon her committed rape. The prosecutrix shouted. Kejau (P.W.2) and Amrit Bai (P.W.5) reached the spot and saw the appellant and the prosecutrix in a compromising situation. Kejau (P.W.2) slapped the appellant. A Baithka

was organized on the next day. Since the matter could not be solved in the Baithka, First Information Report was lodged by the prosecutrix Ex.P/1 on 31-10-2004 i.e. after a period of 8 days in Police Station Arjuni. She was medically examined by Dr. Abha Rani Singh (P.W.12) who did not find any marks of violence either on her person or on her private parts. The prosecutrix also did not complain of any pain during walking or otherwise. It was opined that the prosecutrix was habituated to sexual intercourse. Dr. R.S. Thakur (P.W.15) examined the appellant on 01-11-2004 and opined that he was capable of performing sexual intercourse.

(3) Vaginal slide of the prosecutrix, underwear of the appellant seized vide Ex.P/6 and Petticoat of the prosecutrix seized vide Ex.P/3 were sent for chemical analysis to the Forensic Science Laboratory which confirmed the presence of semen and human spermatozoa on all the above articles vide report dated 30-04-2005. After completion of investigation, the appellant was prosecuted under Section 376 (1) of the I.P.C. The appellant abjured the guilt, pleaded false implication and led no evidence in defence. The learned trial Judge relying upon the evidence of the prosecutrix, Kejau (P.W.(2) and Amrit Bai (P.W.5) and ~~also~~ the facts and circumstances of the case, convicted and sentenced the appellant as aforesaid in paragraph 1.

(4) Shri P.C. Pant, learned counsel for the appellant submitted at the very out set, that he does not assail the finding of the trial Court so far as it relates to the proof of fact that the appellant had committed sexual intercourse with the prosecutrix on the night of 23-10-2004. Learned counsel contended that he impugns the conviction and sentence awarded by the trial Court only on the ground that the sexual intercourse committed

by the appellant with the prosecutrix was wholly with her consent. It was also contended that absence of any satisfactory explanation for the inordinate delay in lodging the FIR Ex.P/1 coupled with absence of injuries on the person of the prosecutrix were indicative of consent of the prosecutrix in the sexual act by the appellant. Learned counsel referred to paragraphs 6 and 8 of the testimony of the prosecutrix which wholly indicated consent of the prosecutrix in the sexual act. On these contentions, learned counsel for the appellant prayed that the conviction and sentence awarded by the learned trial Court should be set aside.

(5) On the other hand, Shri Ashish Shukla, learned Govt. Advocate has referred to paragraph 12 of the impugned Judgment and contended that the learned trial Court has found sufficient explanation for the delay in lodging the FIR. He further referred to the testimony of Kejau (P.W.2) and Amrit Bai (P.W.5) while contending that these witnesses had reached the place of occurrence on hearing shouts of the prosecutrix which clearly revealed that there was absence of any consent of the prosecutrix in the sexual intercourse committed by the appellant.

(6) I have gone through the record of Sessions Case No. 140 of 2005 and considered the rival contentions. The prosecutrix has stated that at about 9.30 p.m. her parents and all relatives had consumed liquor and were sleeping. She stated that she came out for attending call of nature and went towards the Badi of her house. The appellant who was present there caught hold of her hands and after removing her Sari, Saya & underwear, removed his full-pant & underwear and thereafter made her to lie on the ground. After this, the appellant committed sexual act. Presence of the appellant in the Badi of the house of the prosecutrix at

9.00 P.M. is also suggestive of a pre-planned meeting. In cross-examination paragraph 8, she admitted that the houses are so adjacent to the Badi that upon hearing shouts anybody would reach there within a minute's time. In her testimony, she has deposed that the appellant committed sexual intercourse with her for about 10 minutes. It thus appears that if the prosecutrix had shouted immediately after the appellant had caught hold of her or while the appellant undressed her or while undressing himself, the witnesses would have immediately arrived at the place of occurrence. The very fact that the appellant committed sexual intercourse with the prosecutrix for a period of 10 minutes, thereafter leads to an irresistible inference that the prosecutrix did not shout during the sexual intercourse.

(7) The prosecutrix was a married lady and aged about 35 years. There is nothing in the testimony of the prosecutrix which would show that the appellant had used such force upon her during or before the sexual intercourse that she was not in a position to resist or raise an alarm. The prosecutrix has admitted in paragraph 7 of her testimony that neither her bangles were broken during the sexual assault nor did she sustain any injuries on her back. The prosecutrix being a grown up married lady would have resisted if the sexual intercourse was without her consent and upon such resistance being offered during sexual intercourse for a period of about 10 minutes, it was natural that atleast her bangles would have broken or that she would have sustained some injuries on her back since the appellant had removed all her clothes before committing rape on her. The testimony of Dr. Abha Rani Singh (P.W.12) clearly shows that she neither found any injury, swelling or redness on the person or on the

private parts of the prosecutrix nor did the prosecutrix complain of any kind of pain during walking or otherwise.

(7) Kejau (P.W.2) and his wife Amrit Bai (P.W5) are the witnesses who saw the appellant and the prosecutrix in a compromising situation inside the Badi at the time of occurrence. These witnesses have stated that Kejau slapped the appellant. Amrit Bai (P.W.5) has also corroborated the above testimony and has stated that at the same time neighbours Awadh and Shanti Bai also came to the spot and requested that a compromise should be effected in the Baithka. If the witnesses Kejau (P.W.2) and Amrit Bai (P.W.5) would have seen the appellant committing forcible sexual intercourse with the prosecutrix without her consent, natural conduct of these persons would have been that they would have apprehended the appellant and would have either informed the police or lodged a report about the incident. However, nothing of this sort had taken place.

(8) It is pertinent to note that the FIR was lodged by the prosecutrix after considerable delay i.e. on 31-10-2004. Paragraph 6 of her testimony clearly shows that this report after a lapse of 8-9 days was not lodged of her own volition, but was upon being pressurized by the villagers. It is also admitted by the prosecutrix that immediately after the incident she left for another village. A perusal of the FIR lodged by the prosecutrix does not give any satisfactory explanation for the long delay in lodging the FIR, but merely says that due to poverty she could not lodge the report promptly. This reason fails to inspire confidence and is far from being satisfactory

(9) Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that in the facts and circumstances of the case, the prosecutrix is not a truthful witness and her testimony is not worth placing reliance on. The possibility that the sexual assault by the appellant on the prosecutrix was with her consent cannot be ruled out. Conviction and sentence imposed upon the appellant are liable to be set aside.

(10) In the result, the appeal is allowed. Conviction of the appellant under Section 376 (1) of I.P.C. and the sentence awarded thereunder are set aside. Appellant is acquitted of the charge under Section 376 (1) of the I.P.C. and shall be set at liberty forthwith, if not required in any other case. Fine amount, if paid, shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge